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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 261

CANAVERAL PORT AUTHORITY,
Petitioner,

- vs -

1329.25 ACRES OF LAND MORE OR LESS IN BREVARD COUNTY, FLORIDA; PORT REALTY COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION AND APPLICATION TO TAX COSTS

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported in 46 So. (2d) 611; which affirmed the judgment of the Circuit Court in which the case was tried. There was no written opinion of the Circuit Court, but final judgment of said Circuit Court is to be found at R. 62.

JURISDICTION

If this Court has jurisdiction, it must be based on the provisions of Title 28 U. S. C. A., Section 1257 (3). The Respondents desire to call the attention of this Honorable Court to the fact that Petitioner in neither his petition nor his brief in support thereof has complied with the provisions of Supreme Court Rule 12 (1), third paragraph, in that nowhere in the said petition nor in the said brief has Petitioner set forth the stage in the proceedings in the Court of first instance and in the Appellate Court at which and the manner in which the Federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the Court; with such pertinent quotations to specific portions of the record, Court's charge, et cetera, as will support the assertion that rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

THEREFORE, it appears that Petitioner's application for writ of certiorari does not comply with the rules of this Court and should therefore be denied.

QUESTIONS PRESENTED

The Respondents do not agree that the summary statement of matters involved and the second question presented by Petitioner is correct.

The Respondents have no argument with the manner in which the first question is presented, but submit that the second question should be phrased as follows:

SECOND QUESTION

IS A PUBLIC CORPORATION ENGAGED IN BUILDING A DEEP WATER PORT, AND ANY FACILITIES TO BE OPERATED PROFITABLY THEREWITH, REQUIRED

TO MAKE COMPENSATION TO THE OWNER OF UNINVADED UPLAND BORDERING A NAVIGABLE STREAM FOR THE TAKING BY EMINENT DOMAIN OF THE RIPARIAN RIGHTS APPERTAINING TO THE UNINVADED UPLAND, WHEN THERE IS NO AID TO COMMERCE AND NAVIGATION OF THE NAVIGABLE STREAM, AND WHEN THE PURPOSE OF THE TAKING IS NOT LIMITED TO IMPROVING NAVIGATION BUT IS ALSO FOR THE PURPOSE OF ENGAGING IN NON-GOVERNMENTAL BUSINESS ENTERPRISES AND THE ERECTION OF BUILDINGS, STRUCTURES, ROADS, RAILROADS, AND OTHER FACILITIES FOR THE FURTHERANCE OF THE BUSINESS ENTERPRISES?

NO FEDERAL QUESTION INVOLVED

Petitioner has attempted to invoke the XIVth Amendment to the Constitution of the United States.

The Respondents submit that the record shows conclusively that the facts of this case do not bring the action within the provision of the said Amendment and that nowhere in the record in the lower court nor in the Appellate Court has Petitioner previously brought under consideration the XIVth Amendment to the Constitution and therefore is barred from attempting to present it at this time.

STATEMENT

The summary statement of matters involved as set forth in the petition for writ of certiorari before this Court, pages 4, 5 and 6, are not accurate.

It is submitted that a correct statement of the issues is as follows:

The Petitioner is acquiring by eminent domain the subject land for the purpose of constructing an

artificial, deep water port on the Atlantic Ocean and for the further purposes, as shown in paragraph 3 of the petition for condemnation, of constructing warehouses, storehouses, roads and causeways, dry docks, terminal facilities, elevators, grain bins, cold storage plants, bunkers, oil tanks, pipe lines, subways, tramways, cableways, railroads and depots, in addition to the actual facilities of the said deep water port. Rather than constructing said deep water port on a cost-sharing basis with the United States, the petitioner had the responsibility to acquire by eminent domain at its own expense the land necessary for the constructon of a deep water port and other facilities as named above.

There is no purpose, as claimed in Petitioner's brief, to deepen the channel of the Banana River nor to improve the navigation of the Banana River except to the extent that there will be constructed a barge canal from the turning basin across the Banana River and Merritt Island to the Indian River and immediately adjoining the said barge canal there will be a causeway constructed across the Banana River on which it is planned to construct a highway and railroad, and none of the other Port facilities contained in the plan of the district and set forth in the condemnation hereinabove recited are aids to navigation. This differential between the purposes of the condemnation as claimed by the Petitioner and that as claimed by the Respondents becomes material in consideration of the second question hereinabove set forth.

Contrary to the statement in Petitioner's petition for certiorari, both Respondents throughout the trial in the Lower Court both in the pleadings and in the actual trial maintained that they were the owners of the contiguous but uninvaded uplands and as such the owners of the riparian rights which were being taken by the eminent domain proceeding. Testimony

at the trial was given by both witnesses for the Petitioner and for the Respondents upon the question of the value of the uninvaded uplands. The said Circuit court rendered a final judgment in favor of the Respondents and on appeal by Petitioner the same was affirmed by the Supreme Court of the State of Florida.

ARGUMENT

The Respondents submit that there is no Federal question involved either now nor has at any time throughout the pleadings of the trial of the case a Federal question been brought before either the Lower Court or the Appellate Court for consideration, and that therefore this Court has no jurisdiction and the writ of certiorari should be denied.

I. THERE IS NO FEDERAL QUESTION INVOLVED

Petitioner in both its petition for writ of certiorari and in its brief supporting said petition states that both questions presented by Petitioner involve the identical Federal question.

No authority is cited to show that either of said questions presented by Petitioner are Federal in matter, nor even an authority to show that a Federal question is necessarily involved in the Court's decision. Petitioner does say (B. 7) that "it is admitted by all concerned that the Banana River is a stream navigable in fact." That alleged admission appears to be the basis for Petitioner's assumption that a Federal question is involved. Respondents aver, that this assumption is not necessarily true.

The first question presented by the petition is one entirely of State law; i. e. the effect upon the title to riparian rights of the upland owner of a conveyance of the submerged lands by the State of Florida, under a statute of the State allowing the State to convey such submerged lands. The petitioner contended in the State Court that under the statute such

conveyance destroyed the riparian rights of the upland owner. The respondents contended that such conveyance passed the title of the State to the submerged land, but did not divest the upland owner of his riparian rights, which were and still remain vested property rights for which he is entitled to just compensation upon the taking of such riparian rights in eminent domain proceedings. The Supreme Court of Florida upheld the contention of the respondents. This presents no Federal question and no denial of equal protection of the laws under the Constitution of the United States.

The second question likewise does not present any Federal question. The case of Stockton vs. Powell, 29 Fla. 1, 10 So. 688, relied upon by the petitioner as authority for the work of improving navigation in the Banana River is expressly grounded upon the authority of an agency of the State government to perform a work purely local in character in a navigable stream which forms a channel of inter-state commerce and it is expressly stated that this work may be done so long as the free navigation of the river as permitted by the laws of the United States is not impaired or any system for its improvement provided by the general government is not interfered with or defeated. If this is the work of a state agency (which we do not admit), being purely local in its character, it is not based upon any power granted by the Constitution or any statute of the United States, but is a power granted by State law and the duty of the local authority in exercising that power is a question of State law and not a question of Federal law.

An examination of the cases cited by 21 A. L. R. p. 215 under the heading "General Rule" and subheading "United States" and also an examination of the cases cited by 36 C. J. S. 163, paragraph 259, notes 66 and 67, reveals three general classes of cases in which the Supreme Court has jurisdiction as

follows: (a) cases which directly involve the construction of Federal statutes; (b) cases clearly involving matters of inter-state commerce; (c) and cases involving a Federal question which the Supreme Court will not consider when the State Court has decided on independent grounds broad enough to sustain the judgment.

Respondents submit that the case at bar does not fall within any of the classifications set forth in the preceding paragraph. Petitioner, Canaveral Port Authority, was and is a body corporate created and existing under the Laws of the State of Florida. Respondents were citizens of Florida. The eminent domain proceedings were taken by Petitioner as plaintiff in the State Courts under the provisions of the Florida Constitution and State eminent domain statutes. No construction of a Federal statute was or is involved. No matter of inter-state commerce is involved. There was no Federal question involved and the record amply discloses that the Supreme Court of Florida based its decision on evidence and law broad enough to sustain its judgment even if a Federal question had been involved.

The Act creating Canaveral Port Authority as a body corporate and a body politic (Chapter 19-716 Laws of Florida, Acts of 1939) can not be invoked for the purpose of giving Federal jurisdiction. Section 13 of said Act merely provides for the Port Authority to contract with the government of the United States or any agency thereof to procure assistance, and Section 19 of said Act merely gives the Port Authority power to borrow money from any State or Federal agency or agencies.

A decision of a State Court construing the statutes of the State ordinarily is not subject to review by the United States Supreme Court. 36 C. J. S., p. 167.

In Fox River Paper Company v. Railroad Com-

mission of Wisconsin, which happens to be a case also involving riparian rights; 274 U. S. 651, p. 655, the Court, speaking through Mr. Justice Stone, say:

> "There being no question of evasion of the constitutional issue, this court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. Although presumptively title to the soil under navigable waters within the state is in the state, the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decision of the state."

The questions stated by Petitioner present no Federal question nor one necessarily involved in the judgment. When neither is evident, the Supreme Court will not review. 36 C. J. S. 150.

Even where there is a Federal question involved, where there is no intent to evade such question by the state court, its decision on an independent non-federal ground will not be reviewed. 36 C. J. S. 151, note 97.

Where uncertainty exists as for ground for decision, Supreme Court will not review because of its policy of not passing on constitutional questions not clearly necessary to a decision. 36 C. J. S. 152, note 97.

Riparian rights asserted to have been secured by the treaty of Guadalupe Hildalgo between the United States and Mexico are not rights of Federal origin which, when denied, lay the basis for a writ of error, but involve only a question of state law and of general public law. Los Angeles Farming, etc. Co. v. Los Angeles, Cal. 1910, 30 S. Ct. 452, 217, U. S. 217, 54 L. Ed. 736.

Questions respecting the construction of state statutes on which the title to land depends are not

Federal, and cannot be considered by the Federal Supreme Court on writ of error to a state court, O'Connor v. Texas, Tex. 1906, 26 S. Ct. 726, 202 U. S. 501, 50 L. Ed. 1120.

But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. Madisonville Traction Co. v. St. Bernard Min. Co. (Ky. 1905, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed 462.

> "The decision of the supreme court of the state was that the owner of lands bordering on a river owns to the center of the channel, and takes title to any small bodies of land on his side of the channel that have not been surveyed or sold by the government. **It is the settled rule that the question of the title of a riparian owner is one of local law. In** Hardin v. Jordan, 140, U. S. 371, 3 5L. ed. 428, 11 Sup. Ct. Rep. 808, 838, the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice Bradley, delivering the opinion of the court (p. 384, L. ed. p. 434, Sup. Ct. Rep. p. 813):
>
> > " 'In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restrictions of terms, are to be construed as to their effect according to the law of the state in which the lands lie.' "
>
> (Bold type ours.)
> WHITAKER v. McBRIDE,
> 25 S. Ct. Rep. 531,
> 197 U. S. 510.

The question whether the local law annexed the right to alluvion to a certain tract of land, or how it

divided the increment between the owners of two tracts, was not one of those matters which the Supreme Court could re-examine under former section 344 of this title even if the losing party claimed the upland and its legal appurtenances under an Act of Congress, and it belonged to the local law to determine what those legal appurtenances were. Kennedy v. Hunt, Ala.—1849, 7 How. 586, 12 L. Ed. 829.

Where the rights claimed under a United States statute depend upon questions of fact and questions of local law, the decision of the state court thereon does not present a Federal question. Telluride Power Transmission Co. v. Rio Grande Western R. Co., Utah 1903, 23 S. Ct. 178, 187 U. S. 569, 47 L. Ed. 307.

II. NO FEDERAL QUESTION WAS PRESENTED IN LOWER COURT

Petitioner at no point in the proceedings in the Circuit Court nor in the Supreme Court of Florida presented any Federal question to the Court. Previous to this appeal there had been no mention by Petitioner whatsoever of a violation of the XIV Amendment to the United States Constitution. Nowhere in the pleadings or in the trial of the case, nor in the assignments of error, nor in the argument before the State Supreme Court did Petitioner in any manner bring any Federal question into view. The authorities are almost unanimous in maintainng that there must be drawn in question in the lower court a Federal question before the United States Supreme Court can have jurisdiction.

> "To warrant a review by the United States Supreme Court of a decision of the state court it is ordinarily essential that a Federal question have been raised in the state court."
>
> 36 C. J. S., p. 177.

Petitioner must have raised Federal question in

the state courts. 36 C. J. S. 176, citing 44 S. Ct. 261, h. n. 2, reading as follows:

> "Where the plaintiff and a defendant separately appealed from a judgment of dismissal to the State Supreme Court, but the defendant did not by assignments of error in such court raise the question of the validity of a statute under the federal Constitution, it could not raise such question in the United States Supreme Court, though it joined in the assignment of errors raising such question with plaintiff, who raised the objection in all the courts."

The Federal question must be raised in the trial court by pleading. Gibbes v. Zimmerman 290 U. S. 326 54 S. Ct. 140 and cases there cited.

A party who has raised only one Federal question in the state court cannot "come into this court from a state court and argue the question thus raised, and also another not connected with it which was not raised in any of the courts below, and does not necessarily arise on the record although an inspection of the records shows the existence of facts upon which the question might have been raised." Dewey v. Des Moines, Iowa, 1899, 19, S. Ct. 379, 173. U. S. 193, 43 L. Ed. 665.

A Federal question cannot be assumed to have been raised and passed on in a state court so as to give jurisdiction to the Supreme Court when nothing appears on the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made. CAPERTON v. BOWYER, W. Va. 1871, 14 Wall, 216, 20 L. Ed. 882.

The Supreme Court on certiorari will not consider questions not raised or disclosed by record and which were not considered by courts below. EDWARD HINES YELLOW PINE TRUSTEES v. MARTIN, Miss. 1925, 45 S. Ct. 543, 268 U. S. 458, 69

L. Ed. 1050.

The claim in the state trial court that a ruling was contrary to United States Constitution Amendment XIV, affords no basis for a writ of error from the Federal Supreme Court, where no such contention was made in the assignment of errors in the highest court of the state, nor was it, so far as appears by the records, otherwise presented to or passed upon by that Court.

HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO., 1920, 40 S. Ct. 330, 252 U. S. 341, 64 L. Ed. 729.

III. DISCUSSION OF THE MERITS

The first question: As has heretofore been pointed out, the first question presented is not a Federal question but is really a question of State law. It resolves itself simply to this proposition: First, the State of Florida holds title to the submerged land in the Banana River; secondly, the title of the state is burdened with a property right in favor of the upland owner, commonly called riparain rights; thirdly, the submerged land is subject to two titles: (1) a qualified fee simple title in the State of Florida held in trust for all the people of the State; and (2) a qualified property right in favor of the riparian owners; fourthly, the State may sell its interest in the submerged land, pursuant to statutory authority, but such sale does not divest the riparian proprietor of his property. The conclusions hereinabove stated are upheld by the decision of the Supreme Court of Florida in the instant case and that decision is supported by the following decisions of that Court: BROWARD v. MABRY, 50 So. 826, 58 Fla. 398; DEERING v. MARTIN, 95 Fla. 224, 116 So. 54; THIESON v. GULF F. & A. Ry. Co. 75 Fla. 28, 78 So. 491; BRICKELL v. TRAMMELL, 77 Fla. 544, 82 So. 221.

To the same effect see FARNHAM ON WATERS, Vol. 1, p. 216, Sec. 44 and p. 302, sec. 66A.

The second question: The petitioner contends that it is a part of the government of the State and as such is an instrumentality of the State engaged in improving navigation in the Banana River and therefore it is entitled to take the vested property of the Respondents for such improvement without making just compensation and contends that this is a right given by Federal statute. It supports this petition with the line of authorities from this Court holding that the United States, and its instrumentalities who are engaged in improving navigation in a stream which is a channel of interstate commerce, may not be liable in damages for the injury to or destruction of a portion of the riparian rights as a consequence of the lawful performance of the power of the Federal government to improve commerce. That is not the case presented here. In this case the petitioner is a body corporate, organized under the laws of the State, with power not only to improve navigation but to engage in numerous non-governmental business activities for profit and the Act creating the petitioner gave it authority to condemn land for these non-governmental business activities and the petition expressly shows that the purpose of the petitioner in taking the property is not limited to the improvement of navigation but that the property is sought for these numerous non-governmental business enterprises. (Tr. 2). This Court has clearly pointed out the distinction between the first right contended for by the petitioner and the real right being exercised by it of taking property for a public purpose. SCRANTON v. WHEELER, 179 U. S. 141, 45 L. Ed. 126, 21 S. C. 48; YATES v. MILWAUKEE, 10 Wallace 497, 10 L. Ed. 984; UNITED STATES V. LYNAH, 188 U. S. 471, 47 L. Ed. 549, 23 S. Ct. 349; UNITED STATES v. RIVER ROUGE IMPROVEMENT COMPANY, 269 U. S. 411, 46 S. C. 144.

A case directly in point is that of HEWITT-LEA

LUMBER COMPANY v. KING COUNTY, 113 Wash. 431, 194 Pac. 377, 21 A. L. R. 205.

In this case, the Supreme Court of Washington decided adversely to the contention of the petitioner and this Court placed the stamp of its approval upon this decision by dismissing the writ of certiorari for want of jurisdiction, in 257 U. S. 622, 661.

CONCLUSION

The writ of certiorari should be denied first because the questions presented are not Federal questions and second even if Federal questions they were not properly raised in the Lower Court, and third upon the additional grounds that neither of the questions presented is meritorious as a matter of law.

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APPLICATION TO TAX COSTS AND EXPENSES, INCLUDING ATTORNEYS' FEES

The respondents respectfully petition the Court to tax costs and expenses incurred by the respondents on this petition for certiorari, including the cost of printing the brief, and a reasonable fee for the respondents' counsel on this petition, against the petitioner.

The Florida Statute relating to eminent domain, Florida Statutes 1949, Chapter 73, Section 73.16, reads as follows:

> "All costs of proceedings shall be paid by the petitioner, including a reasonable attorney's fee to be assessed by the jury, except the costs upon the appeal taken by a defendant, in which the judgment of the circuit court shall be affirmed."

Acting on this authority, an award for attorneys' fees was made in the Circuit Court, and on the appeal an award was made for counsel fees in behalf of the appellees. See:

> Canaveral Port Authority vs. 1329.25 Acres of land, 46 So. (2d) 611.

In the case of Dade County vs. Brigham et al., 47 So. (2d) 602, not yet published in the bound volumes, but to be found in the advance sheets of September 21, 1950, the Supreme Court of Florida upheld the right of the Court to tax the expenses incurred by the property owner in establishing his right to just compensation for the land taken, including in that particular case the expenses of expert witnesses on the value of property. This is grounded upon the following language in the last case:

> "He does not want to sell. The property is taken from him through the exertion of the high powers of the statute, and the spirit of of the Constitution clearly requires that he shall not be thus compelled to part with what

> belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals, as well as by the spirit of the Constitution; and it will not be presumed that the legislature has intended to deprive the owner of the property of the full protection which belongs to him as a matter of right."

We respectfully submit that under Rule 32 of this Court, providing for the allowance of costs, applied to the letter and spirit of the Florida Statute, the costs sustained by the respondents on this petition for certiorari, including reasonable counsel's fees for respondents' counsel, and the expenses of printing the brief required by the rules, should be taxed against the petitioner and judgment entered accordingly.

WHEREFORE, respondents pray an order of the Court taxing the said costs.

Respectfully submitted

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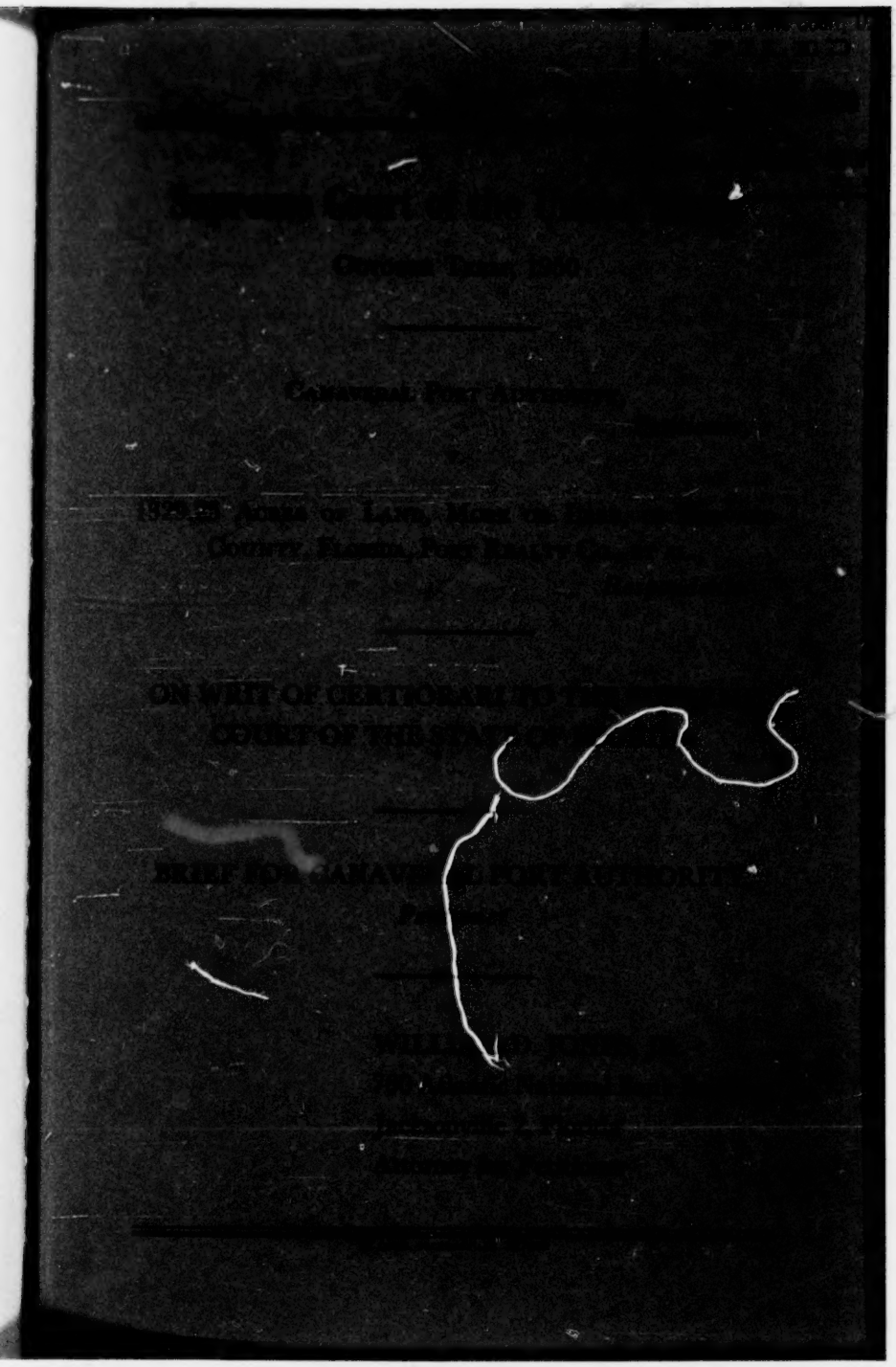

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 261

CANAVERAL PORT AUTHORITY,

Petitioner,

v.

1329.25 ACRES OF LAND, MORE OR LESS, IN BREVARD COUNTY, FLORIDA, PORT REALTY CO., ET AL.,

Respondents.

BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 42 So. (2d) 611.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on May 26, 1950 (R. 68). The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257.

QUESTIONS PRESENTED

The Petitioner brought these proceedings to condemn lands for use in performing a project in aid of commerce and navigation in the Banana River on a cost sharing basis with the United States, acting under the Rivers and Harbors Act of Congress, approved March 2, 1945, as Public Law No. 14, 79th Congress, First Session, in accordance with a project set forth in House Document No. 367, 77th Congress, First Session. The Petitioner is a body corporate and politic under the Laws of the State of Florida and is vested with the power of eminent domain, pursuant to the privileges, prerogatives, powers, duties and responsibilities set forth in Chapter 19716, Laws of Florida, Acts of 1939, as now amended, supplemented and added to by Chapter 21139, Laws of Florida, Acts of 1941; Chapter 23199, Laws of Florida, Acts of 1945; Chapter 24403, Laws of Florida, Acts of 1947; Chapter 24996, Laws of Florida, Extraordinary Session of 1948, and Chapters 25700 and 25707, Laws of Florida, Acts of 1949. In the Circuit Court the Respondents, whose property was contiguous to but uninvaded by the taking, without any answer directly or by way of intervention having been filed, claimed and were severally allowed compensation for the alleged taking of the riparian rights formerly appertaining to said uninvaded uplands long prior to the filing of the Petition for Condemnation (R. 1). The State of Florida, in accordance with the provisions and procedure provided for in Section 253.13, Florida Statutes, and acting by and through its Trustees of the Internal Improvement Fund of the State of Florida, pursuant to the authority conferred upon said Trustees by Section 253.12, Florida Statutes, did convey to Canaveral Port Authority that portion of the submerged bed of the Banana River, a stream navigable in

fact, lying immediately westward and contiguous to the uninvaded lands of the Respondent, Elizabeth Holmes, which is described as Lot 1 of Reeds Subdivision. The submerged lands conveyed also lie immediately westward of and contiguous to the uninvaded uplands of the Respondent, Elliott M. Burns, known as the North 153.4 feet of Lot 2 of Reeds Subdivision (R. 24 A). The indicated deed of conveyance is Petitioner's Exhibit No. 32 (R. 33). The questions presented are:

1. ARE RIPARIAN RIGHTS APPURTENANT TO UPLAND FAST LANDS TERMINATED AND ENDED BY A CONVEYANCE BY THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA OF THE SUBMERGED LANDS IN THE BED OF A NAVIGABLE STREAM FROM THE HIGH WATER MARK OF SAID STREAM OUTWARD TO A GRANTEE NOT THE OWNER OF THE UPLAND PROPERTY?

2. IS A STATE GOVERNMENTAL INSTRUMENTALITY ENGAGED IN A PUBLIC PROJECT IN AID OF COMMERCE AND NAVIGATION IN THE BED OF A NAVIGABLE STREAM REQUIRED TO MAKE COMPENSATION TO THE OWNER OF THE UNINVADED UPLAND TO THE EXTENT OF THE DEPRECIATION IN THE VALUE THEREOF ARISING FROM THE DESTRUCTION OF THE RIPARIAN RIGHTS FORMERLY APPERTAINING TO THE UNINVADED UPLAND AS THE PROXIMATE RESULT OF THE PERFORMANCE OF SAID PUBLIC PROJECT?

FEDERAL QUESTION INVOLVED

As to both questions here involved the identical Federal Question is present.

The Constitution of 1886 of the State of Florida now in force and effect contains two provisions concerning compensation for the taking of private property for public use, namely, Section 12 of the Bill of Rights and Section 29, Article XVI of said Constitution. No other constitutional or statutory provisions of the State of Florida exist as a support for the before indicated awards against Canaveral Port Authority here complained of. As will appear from the statement included hereinbelow, neither of the referred to Florida Constitutional provisions are applicable in the premises and hence the awards severally made by the said Circuit Court by adjudicating Paragraphs numbered 24 and 25 (R. 54) of its said final judgment of August 26, 1949, as affirmed by the Supreme Court of Florida by its opinion and judgment rendered on May 26, 1950 (R. 68), 46 So. (2d) 611, constitute and are adjudications against Canaveral Port Authority in denial of an equal protection of the laws as guaranteed unto it by the 14th Amendment to the Constitution of the United States.

STATEMENT

This is a proceeding by Canaveral Port Authority, hereafter referred to as the "Authority", to condemn 1329.25 Acres of Land in Brevard County, Florida, the land to be used for the purpose of aiding commerce and navigation in the Banana River on a cost sharing basis with the United States, acting under the Rivers and Harbors Act of Congress, approved March 2, 1945, as Public Law No. 14, 79th Congress, First Session, in accordance with a project set forth in House Document No. 367 of

the 77th Congress, First Session. As a part of its contribution to the joint enterprise with the United States the Authority undertook to acquire in its name by eminent domain the fee title to two areas of property in Brevard County, Florida. One of such areas is located on Merritt Island and is not here involved. The other area lies on the ocean barrier between the Atlantic Ocean and the Banana River, with a part of this area extending westward from the eastern meander or high water mark of the river into the submerged bed thereof (R. 24A). Different portions of the area so sought were owned by separate entities and the Authority in its Petition for Condemnation separated the areas of fast and submerged lands under acquisition into separate ownership parcels which were numerically designated (R. 1). Parcel No. 20 (R. 5) described the entire area of submerged land involved in the proceedings and the Petition (R. 6) alleged the same was owned in fee simple by the Authority. Hence, the proceedings as to said Parcel No. 20 merely sought a judicial confirmation of the fee simple title theretofore acquired by the Authority under conveyances from the State of Florida (R. 31 and 33). The east boundary of the submerged lands, Parcel 20, (R. 5 and 24A) is the high water mark of the Banana River. From the northeast corner of said submerged land running southward for a distance of 200 feet it is contiguous to the west boundary line of the abutting and uninvaded property of the Respondent, Elizabeth Holmes, and is known as Lot 1 of Reeds Subdivision. Extending southward for a further distance of 153.4 feet it is contiguous to the west boundary of the abutting and uninvaded property of the Respondent, Elliott M. Burns, known as the North 153.4 feet of Lot 2 of Reeds Subdivision. Both Respondents became defendants to the proceedings by

reason of ownerships held by them which were located within the perimeter area of the lands under acquisition (R. 15 and 16). Neither Respondent as the owner of the indicated contiguous but uninvaded uplands took any action to intervene in said proceedings as the others of said contiguous lands, nor did they present any pleadings by way of answer to the Petition (R. 1), or otherwise, asserting any right to compensation in the proceedings from the Authority with respect to their uninvaded, and hence untaken, properties. The Trial Court held as a matter of law that the Respondents, severally, as the owners of the indicated contiguous but uninvaded properties were entitled to be compensated in the Authority's proceedings to the extent that said contiguous properties would be diminished in market value by thereafter being deprived of the riparian rights formerly appertaining thereto. The said Court held as a matter of law that riparian rights were property rights which could not be taken without compensation being made therefor (R. 21 and 22). The final judgment of August 26, 1949 (R. 47) resulted from such holding and on appeal to the Supreme Court of Florida by the Authority the same was affirmed (R. 68).

ARGUMENT

I

AS TO THE FIRST QUESTION

In Florida private ownership of property extends only to the meander or high water mark of the stream or other body of water, whether fresh or salt, that is navigable in fact. Rivas v. Solary, 18 Fla. 122; Ruge v. Apalachicola Oyster Canning & Fish Co. 25 Fla. 656, 6 So. 489; State v. Black River Phosphate Company, 27 Fla. 276, 9 So. 205; State v. Gerbing, 56 Fla. 603, 47 So. 353; Ferry

Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643; Bass v. Ramos, 58 Fla. 161, 50 So. 945; Broward v. Mabry, 58 Fla. 398, 50 So. 826; Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428; Clements v. Watson, 63 Fla. 109, 58 So. 25; Symmes v. Prairie Pebble Phosphate Company, 64 Fla. 480, 60 So. 223; Ex parte Powell, 70 Fla. 363, 70 So. 392; Panama Ice & Fish Co. v. Atlanta & St. A. B. Ry. Co., 71 Fla. 419, 70 So. 608; Thiesen v. Gulf, F & A. Ry. Co., 75 Fla. 28, 78 So. 491; Brickell v. Trammel, 77 Fla. 544, 82 So. 221; City of Tarpon Springs v. Smith, 81 Fla. 479, 88 So. 613; Tampa Southern R. Co. v. Nettles, 82 Fla. 2, 89 So. 223; Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 98 So. 505; State v. City of Tampa, 88 Fla. 196, 102 So. 274; Martin v. Busch, 93 Fla. 535, 112 So. 274; Freed v. Miami Beach Pier Corp., 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177; Deering v. Martin, 95 Fla. 259, 116 So. 54; Lipscomb v. Gailourakis, 101 Fla. 1130, 133 So. 104; State ex rel Landis v. Rosenthal, 109 Fla. 363, 148 So. 769; Perky Properties, Inc. v. Felton, 113 Fla. 432, 151 So. 892; Hicks v. State ex rel Landis, 116 Fla. 603, 156 So. 603; Adams v. Elliott, 128 Fla. 79, 174 So. 731; White v. Hughes, 139 Fla. 54, 190 So. 446; Caples v. Taliferro, 144 Fla. 1, 197 So. 861.

It is admitted by all concerned that the Banana River is a stream navigable in fact.

The State of Florida holding title to the submerged lands under the navigable waters of the Banana River in trust for the people of the State, that they might enjoy the navigation of the waters thereof and carry on commerce over them, Hicks v. State ex rel. Landis, 116 Fla. 603, 156 So. 603, brought about the creation of Canaveral Port Authority as a body corporate and body politic by the enactment of Chapter 19716, Laws of Florida, Acts of

1939. One of the duties and responsibilities placed upon the Authority by the legislation enacted by said Chapter 19716 was to improve commerce and navigation within the Port District, as there defined, either alone or in conjunction with the United States. Thereafter, and in order that the Authority might proceed with its statutory duties and responsibilities, the State of Florida conveyed the required submerged lands, known in the proceedings as Parcel No. 20 (R. 24A) to the Authority. At no time prior to or after the execution of the aforesaid conveyances to the Authority by the State of Florida did either Respondent, as the owners of the indicated but uninvaded uplands, undertake to preserve their riparian rights within the area so conveyed, as they were privileged and authorized to do under the provisions of and within the time prescribed by Section 253.14, Florida Statutes. Consequently, upon the institution of the present proceedings on January 19, 1949, a date long after the expiration of the privileges granted by Section 253.14, Florida Statutes, neither of the uninvaded but contiguous upland properties before referred to were impressed with appurtenant riparian rights.

Such being the situation, no interest was taken by the Authority as to either uninvaded but contiguous property of the Respondents, severally, for which a right to be compensated arose in favor of either of said Respondents. This fact was ignored by the Supreme Court of Florida in rendering its opinion and judgment on May 26, 1950 (R. 68).

II

AS TO THE SECOND QUESTION

It specifically appearing from the Authority's proceedings that it was engaged in a public project in aid of commerce and navigation (R. 2), the Florida Court

failed to recognize by its opinion and judgment (R. 68) that even if appurtenant riparian rights did in fact exist with respect to the contiguous but uninvaded uplands of the Respondents, severally, that yet the owners of such uninvaded uplands are not entitled to any compensation as either (a) the direct value of such riparian rights for the reasons stated under our discussion of the First Question, or (b) as the diminishment in the market value of the uninvaded uplands arrived at by measuring the value of such riparian rights, for private riparian rights are ownerships subordinate to the title of the sovereign state or its instrumentality, one of whose primary and lawful exercises of such ownership is to engage in projects in aid of commerce and navigation for the public generally. This lawful exercise of sovereign ownership being paramount to any mere private property right gives rise to no constitutional right of compensation either under the State or the Federal Constitutions in instances where the private right is damaged, altered or destroyed by the lawful exercise of the plenary sovereign right and duty to engage in such projects.

It is well settled that where the United States engages in such a project under the constitutional servitude attached as a mere appurtenant to the sovereign title of the State under the commerce clause of the Constitution of the United States, no right of compensation under the 5th Amendment, or otherwise, accrues against it and in favor of the owner of private riparian rights such as the Respondents here. South Carolina v. Georgia, 93 U. S. 4; Shively v. Bowlby, 152 U. S. 1; Scranton v. Wheeler, 179 U. S. 141, 163; Gibson v. United States, 166 U. S. 269, 275-276; United States v. Chandler-Dunbar W. P. Co., 229 U. S. 53; Bailey v. United States, 62 C.Cls. 77, certiorari denied, 273 U. S. 751; United States v. Chica-

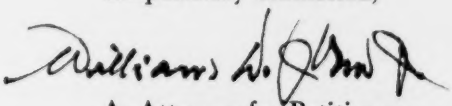
go, M. St. P. & P. R. R. Company, 312 U. S. 592, 596-597, and cases there cited, and United States v. Commodores Park, Inc., 324 U. S. 386 and cases there cited.

The Supreme Court of Florida has recognized that the constitutional delegation of powers by the States to the general government are not exclusive of the continued exercise, in fact the continued duty to exercise itself, or through its local state agencies, the power so delegated to the general government so long as such exercise is not in conflict with the delegated servitude enjoyed by the United States. Stockton v. Powell, 29 Fla. 1, 10 So. 688; State v. Gordon, 138 Fla. 312. And the Supreme Court of the United States has long recognized the plenary power of a state to continue to exercise a power delegated to the general government by the Constitution of the United States. Wilson v. Marsh Co., 2 Pet. 245; Gilman v. Philadelphia, 3 Wall, 713; Pound v. Turck, 95 U.S. 459; Davidson v. New Orleans, 96 U.S. 107; Mobile Co. v. Kimball, 102 U.S. 691; Escanaba & L. M. Transportation v. Chicago, 107 U.S. 678; Hagan v. Reclamation District, 111 U.S. 701; Cardwell v. Bridge Co., 113 U.S. 205; Hamilton v. Railroad Co. 119 U.S. 280, and Bridge Co. v. Hatch, 125 U.S. 1.

CONCLUSION

For the reasons here stated, the Judgment of the Supreme Court of Florida (R. 68) should be reversed.

Respectfully submitted,



As Attorney for Petitioner,

Canaveral Port Authority